

Top Ten Issues To Know When Filing a Case with the Authority



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1. File Documents on Time

▶ Exceptions to Arbitration Awards

- Within 30 days of *service* of award
 - 5 U.S.C. § 7122(b); 5 C.F.R. § 2425.1(b)

▶ Time limit cannot be extended or waived

- 5 C.F.R. § 2429.23(d)
- 5 U.S.C. § 7122(b)

▶ Award Served by Email

- Date of Email *transmission* by Arbitrator
 - *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol*, 63 FLRA 345, 346–47 (2009)
 - *SSA, Headquarters, Woodlawn, Md.*, 63 FLRA 302, 303–04 (2009)

1. File Documents on Time

▶ New Rule: Commercial Delivery

- Effective November 9, 2009, service by commercial delivery (e.g., Fed Ex, UPS) effective date deposited.
 - 5 C.F.R. § 2429.21(b)

1. File Documents on Time

▶ Negotiability Petition for Review

- Within 15 days of agency allegation of non-negotiability or Agency head disapproval

- 5 C.F.R. § 2424.21(a)

OR

- Within 10 days of Agency's failure to respond to request for allegation of non-negotiability

- 5 C.F.R. § 2424.21(b)

▶ Time limit cannot be extended or waived

- 5 C.F.R. § 2429.23(d)

1. File Documents on Time

▶ Negotiability Petition for Review

- Do Not File Petition Prematurely
 - If Union requests allegation of non-negotiability, then must wait 10 days for Agency to respond
 - 5 C.F.R. § § 2424.11(a); 2424.21(b)
- If premature:
 - Dismissed without prejudice
 - Requires re-filing of petition

1. File Documents on Time

▶ Representation Application For Review

- Within 60 days of RD's Decision and Order
 - 5 U.S.C. § 7105(f)
 - 5 C.F.R. § 2422.31(a)
- Must be filed with the Authority
 - *U.S. Dep't of Veterans Affairs Med. Ctr.*, 63 FLRA 593, 594–95 (2009)

▶ Time limit cannot be extended or waived

- 5 C.F.R. § 2429.23(d)
- *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Hampton, Va.*, 64 FLRA 391, 391–92 (2010)

2. Comply With Service & Filing Requirements

▶ General Service Requirements

- Serve all parties with anything you file
 - 5 C.F.R. § § 2429.12(b); 2429.27(c), (d)

▶ Negotiability: Special requirements

- Union *must* serve petition on:
 - Agency principal bargaining representative AND
 - Agency head or Agency head designee
 - 5 C.F.R. § § 2424.2(g); 2424.22(d)

2. Comply With Service & Filing Requirements

▶ Negotiability: Special requirements

- Failure = Deficiency Order

AFGE, Local 1968, 63 FLRA 481, 482 (2009)

- Union did not serve petition on Agency head
 - Union cured service deficiency BUT
 - Agency principal bargaining representative unaware of cure
 - Agency filed untimely SOP
 - Authority waived time limit on untimely SOP
-
- Unaware of Agency Head Designee?
 - Contact Authority's Office of Case Intake and Publication:
(202) 218-7740

2. Comply With Service & Filing Requirements

▶ Supplemental Submissions

- Must request leave to file
 - 5 C.F.R. § 2429.26
- Must argue *why* submission is necessary
 - Addresses new argument raised by opposing party
 - Concerns Authority's jurisdiction

3. Cure Deficiencies & Respond to Authority Orders

▶ Common Deficiency Orders:

- Failure to provide correct number of copies
 - Effective November 9, 2009, original + 4 copies
 - 5 C.F.R. § 2429.25
- Failure to provide statement of service
 - 5 C.F.R. § 2429.27
- Failure to provide Table of Contents
 - Effective November 9, 2009, must include table of contents if submission more than ten pages
 - 5 C.F.R. § 2429.29

3. Cure Deficiencies & Respond to Authority Orders

▶ Common Show Cause Orders:

- Failure to cure procedural deficiencies
- Timeliness
- Interlocutory
 - 5 C.F.R. § 2429.11
 - *U.S. Dep't of Labor*, 63 FLRA 216, 217 (2009)
- Moot/Advisory Opinion
 - 5 C.F.R. § 2429.10
- Lack of Jurisdiction – § 7121(f) Matters
 - “inextricably intertwined” with a matter appealable to the MSPB (e.g., removal)
 - 5 U.S.C. § § 7121(f), 7122(a)
 - *Interior, Bureau of Indian Affairs*, 63 FLRA 2 (2008)
- Lack of Jurisdiction – Classification
 - 5 U.S.C. § 7121(c)(5)

3. Cure Deficiencies & Respond to Authority Orders

▶ Failure to Respond May Result in Dismissal

- *AFGE, Local 1417*, 63 FLRA 349, 350 (2009)
 - Union exceptions dismissed
 - Failed to cure procedural deficiency (insufficient number of copies and no service statement)
 - Failed to respond to subsequent order to show cause

▶ Practice Note:

- Address procedural / jurisdictional questions in initial filing to avoid delays in case processing

4. Provide an Adequate Record

▶ Arbitration Exceptions

- Parties' submissions = Authority's only information
- Provide relevant portions of cited:
 - CBA provisions
 - Transcript
 - Exhibits
 - Agency regulations
 - Briefs to Arbitrator (pre-hearing; post-hearing)

4. Provide an Adequate Record

► Examples:

- *U.S. Army Corps of Engr's, Portland, Nw. Div., Portland Dist., Portland, Or.*, 59 FLRA 86, 88 (2003)
 - Agency failed to provide cited CBA provisions
 - Authority unable to apply *BEP* analysis
 - Management rights exception denied
- *U.S. Dep't of Labor, Wash., D.C.*, 55 FLRA 1019, 1021-22 (1999)
 - Agency failed to submit disputed settlement agreement
 - Essence exception denied
- *AFGE, Local 1151*, 54 FLRA 20, 25 (1998)
 - Union failed to provide Agency regulation
 - Contrary to law exception denied

4. Provide an Adequate Record

► Examples:

- *AFGE, Local 1151*, 54 FLRA 20, 25 (1998)
 - Union failed to provide Agency regulation
 - Contrary to law exception denied
- *Fed. Employees Metal Trades Council*, 49 FLRA 1096, 1099–1100 (1994)
 - Union failed to provide allegedly false documents or hearing transcript
 - Union allegation that award obtained by fraud denied

4. Provide an Adequate Record

- ▶ CITE but do NOT submit:

- Authority decisions
- Federal court decisions
- C.F.R.
- U.S.C.

- ▶ Negotiability

- Only record available to Authority is Petition for Review, Post-Petition Conference Report, Statement of Position, Union Response, Agency Reply, and any attachments

5. Raise Issues Below

- ▶ 5 C.F.R. § 2429.5

The Authority will not consider...evidence... or any issue...which was not presented in the proceedings...before the [RD], Hearing Officer, [ALJ], or arbitrator.

- ▶ Evidence, issues, matters, arguments

- ▶ *But see U.S. Dep't of the Army, Army Tank-Automotive & Armaments Command, Warren, Mich.*, 61 FLRA 637, 639 (2006)

- Authority denied union's claim that agency's argument was barred by 2429.5 where agency showed that argument was raised in its post-hearing brief to arbitrator

5. Raise Issues Below

▶ § 7106 Management Rights

- The following framework applies to exceptions alleging an award is contrary to management rights:
- If award affects a management right, then must determine whether:
 - (1) enforces an applicable law or CBA provision negotiated under § 7106(b); and
 - (2) reconstructs what Agency would have done if it had complied with law/provision
 - *Dep't of Treasury, Bureau of Engraving & Printing, 53 FLRA 146 (1997) (BEP).*

5. Raise Issues Below

▶ § 7106 Management Rights

- *U.S. Dep't of the Treasury, IRS, Andover, Mass.*, 63 FLRA 202 (2009)
 - Remedy: Agency to provide sign language interpreter
 - Exception alleging violates mgt's right to assign work dismissed under § 2429.5
- *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178 (2009)
 - Arbitrator: Agency violated placement process by not posting internal vacancy announcement
 - Exception alleging that award violates mgt's rt to select from any appropriate source dismissed under §2429.5 because:
 - Agency could have, but did not argue to Arbitrator
 - Agency did not except to Arb's framing of issue
 - Agency's own framing indicated it was aware that placement process at issue

5. Raise Issues Below

- ▶ § 7106 Management Rights
- ▶ Practice Point: Authority will dismiss a claim that an award violates management rights if this claim could have been, but was not, raised to the arbitrator.
 - *See also U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Mobile Dist., Mobile, Ala.*, 64 FLRA 508, 509 (2010).

5. Raise Issues Below

▶ Other Issues

- *AFGE, Council 236*, 63 FLRA 213, 214 (2009)
 - Arbitrator: Agency did not violate case law by canceling union representative's telework
 - Union's exception: violates § 7116(a)(1) and (2)
 - Dismissed § 2429.5: could have, but did not, raise ULP claim to Arbitrator

- *NTEU*, 63 FLRA 70, 74 (2009)
 - Union: Arbitrator should not have considered parties' bargaining history
 - Dismissed § 2429.5: could have, but did not, raise to Arbitrator

5. Raise Issues Below

- *U.S. Dep't of Transp., FAA, Houston, Tex,*
63 FLRA 34, 36 (2008) (ULP case)
 - Agency: ALJ's notice posting violates Privacy Act
 - Dismissed § 2429.5: could have, but did not, raise to ALJ
- *U.S. Dep't of Transp., FAA, Detroit, Mich.,*
64 FLRA 325, 328 (2009)
 - Agency: parties' agreement did not incorporate certain regulations
 - Dismissed § 2429.5: Agency conceded to Arbitrator that agreement did incorporate regulations
- *Library of Congress,* 63 FLRA 515, 520 (2009)
 - Agency: anti-disclosure interest prevented it from providing requested information
 - Dismissed § 2429.5: could have, but did not, raise to arbitrator

5. Raise Issues Below

- ▶ Compare: Addressed Issue Below, But in a Contrary Way
 - *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 328 (2009)
 - Authority dismissed agency's argument on exceptions that parties' agreement *did not incorporate* certain regulations where agency conceded to arbitrator that agreement *did incorporate* such regulations.

6. Take Advantage of All Available Filings

▶ Negotiability

- 5 C.F.R. § 2424.32(c)(2):
 - Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a **concession** to such argument or assertion.
- Failure to file Statement of Position (Agency) or Response to SOP (Union) amounts to concession of other party's arguments

6. Take Advantage of All Available Filings

- ▶ No Legal Argument in Petition, No Response
 - Amounts to Union concession of Agency SOP arguments
 - Authority: Denied Petition
 - *NLRB Union and NLRB*, 62 FLRA 397, 401–03 (2008), *aff'd sub. nom, NLRB Union v. FLRA* (D.C. Cir. 2009).
 - *NATCA*, 62 FLRA 337 (2008).
- ▶ Legal Argument in Petition, No Response
 - Amounts to concession of arguments in SOP
 - Authority: Denied Petition
 - *AFGE and VA Central Iowa*, 62 FLRA 459, 462 (2008)

7. Argue Relevant Legal Standards: Arbitration

- ▶ Appeals of arbitration awards constitute majority of Authority's case load
- ▶ Types of Exceptions:
 - Contrary to law
 - Private sector grounds

7. Argue Relevant Legal Standards: Arbitration

- ▶ **Contrary to law exceptions**
 - *De novo* review
 - Deference to Arbitrator's factual findings

- ▶ **§ 7106 Management Rights**
 - *BEP*, 53 FLRA 146 (1997)
 - If award affects a management right, then determine whether:
 - (1) enforces an applicable law or CBA provision negotiated under § 7106(b); and
 - (2) reconstructs what Agency would have done if it had complied with law/provision

7. Argue Relevant Legal Standards: Arbitration

▶ Private Sector Grounds

- Reviewed with deference to Arbitrator

1. Bias

- Award procured by improper means;
- Arbitrator was partial or corrupt; OR
- Arbitrator engaged in misconduct that prejudiced parties' rights

7. Argue Relevant Legal Standards: Arbitration

2. Essence

- Not rationally derived from agreement;
- So unfounded in reason and fact, unconnected w/wording and purpose of agreement as to manifest infidelity to obligation of arbitrator;
- Implausible interpretation of agreement; OR
- Evidences manifest disregard of agreement

3. Fair Hearing

- Arbitrator refused to hear or consider pertinent & material evidence; OR
- Actions so prejudiced as to affect fairness of proceeding as a whole

7. Argue Relevant Legal Standards: Arbitration

4. Exceeds Authority

- Arbitrator failed to resolve submitted issue;
 - Resolved issue not submitted;
 - Disregarded specific limitations on authority; OR
 - Awarded relief to non-grievants
-
- Stipulated issue: Arbitrators do not exceed their authority by addressing an issue that is necessary to decide a stipulated issue or by addressing an issue that necessarily arises from issues specifically included in a stipulation.
 - Framed issue: In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference.

7. Argue Relevant Legal Standards: Arbitration

5. Incomplete, Ambiguous, or Contradictory

- Incomplete, ambiguous, or so contradictory as to make implementation of the award impossible.

6. Nonfact

- Central fact is clearly erroneous, but for which different result
 - Cannot challenge factual matters disputed before Arbitrator

7. Public Policy

- Must be explicit, well-defined, and dominant; and
- Violation of policy must be clearly shown.

8. Argue Relevant Legal Standards: Miscellaneous Issues

▶ Arbitrability

- Procedural arbitrability involves procedural questions, such as whether the preliminary steps of the grievance procedure have been exhausted or excused, and is distinguished from substantive arbitrability, which involves questions regarding whether the *subject matter* of a dispute is arbitrable.

8. Argue Relevant Legal Standards: Miscellaneous Issues

▶ Arbitrability

◦ Procedural Arbitrability

- May not directly challenge ruling itself
- But, may challenge as deficient because:
 - Contrary to law
 - Arbitrator exceeded authority
 - ONLY where not directly challenging procedural arbitrability determination itself
See, e.g., U.S. Dep't of Transp., FAA, 64 FLRA 612, 613 (2010)
- Bias

◦ Substantive Arbitrability

- Determinations based on statute reviewed *de novo*.
- Determinations based on contract subject to deferential essence standard.

8. Argue Relevant Legal Standards: Miscellaneous Issues

▶ Separate and Independent Grounds

- Where Arbitrator bases decision on separate and independent grounds
- Must establish award deficient on all grounds
 - *U.S. Dep't of Justice, Fed. Bureau of Prisons, Wash., D.C.*, 64 FLRA 559, 561 (2010)

▶ Bare Assertions

- Authority will reject unsupported arguments
 - *AFGE*, 63 FLRA 627, 628 n.3 (2009)

9. Make Arbitrators Aware of Legal Requirements

- ▶ **Contract provisions that mirror statutory provisions**
 - *AFGE, Local 3506*, 64 FLRA 583, 584 (2010)
- ▶ **Arguing ULP in arbitration**
 - Arbitrator must apply statutory ULP standards
 - *NTEU*, 64 FLRA 504, 506 (2010)
- ▶ **Other controlling administrative precedent**
 - *NAIL, Local 6*, 63 FLRA 232, 234 (2009) (applying MSPB precedent to resolve claim arising from Agency's reduction-in-force)

9. Make Arbitrators Aware of Legal Requirements

- ▶ Insufficient Factual Findings = Remand
 - Failure to address statutory elements
 - *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009).
 - Arbitrator: fitness for duty exam = investigative interview
 - Authority: CBA provision mirrors § 7114(a)(2)(B), four factor test applies
 - No factual findings 1st and 2nd factors, Authority can't assess whether award contrary to § 7114(a)(2)(B)
 - Remand for resubmission to Arbitrator, absent settlement

9. Make Arbitrators Aware of Legal Requirements

- ▶ Insufficient Factual Findings = Remand
 - Failure to address statutory elements
 - *AFGE, Local 2054*, 63 FLRA 169, 172–73 (2009).
 - Arbitrator: no formal discussion = no ULP
 - Union: award contrary to § 7114(a)(2)(A) of the Statute
 - Authority: four formal discussion elements have to be satisfied
 - No factual findings 2nd factor, Authority can't assess whether award contrary to § 7114(a)(2)(A)
 - Remand for resubmission to Arbitrator, absent settlement

9. Make Arbitrators Aware of Legal Requirements

▶ Back Pay Act / Attorney Fees

- Authority must remand where record inadequate
 - *AFGE, Local 2054*, 63 FLRA 169 (2009)
 - Arbitrator didn't articulate reasons for denial of attorney fees
 - No evidence to determine basis of denial
 - Remanded for clarification
 - *AFGE, Local 3105*, 63 FLRA 128 (2009)
 - Arbitrator – not FLRA – “appropriate authority” for resolving award of attorney fees
 - Arbitrator made no factual findings regarding reasonableness of amount requested
 - Agency specifically contested reasonableness of amount before Arbitrator
 - Amount attorney fees remanded for resubmission to Arbitrator, absent settlement

10. Argue Relevant Legal Standards: Representation

- ▶ Limited grounds for seeking review of RD's decision and order.

- ▶ 5 C.F.R. § 2422.31(c):
 - Absence of precedent;
 - Established law or policy warrants reconsideration;
 - RD failed to apply established law;
 - RD committed prejudicial procedural error; OR
 - RD committed clear and prejudicial error concerning a substantial factual matter.

10. Argue Relevant Legal Standards: Representation

- ▶ Parties must establish, and RD must base decision on, **actual duties**

- *U.S. Dep't of Def., Pentagon Force Prot. Agency*, 62 FLRA 164, 172 (2007)
 - 5 categories of police officers
 - National security determination must be based on “actual duties” of each category, not generalized findings as to all
- *U.S. Dep't of the Army, U.S. Army Garrison, Fort Lee, Va.*, 63 FLRA 145, 148 n.5 (2009).
 - Future duties may not be considered unless changes are “definite and imminent”

10. Argue Relevant Legal Standards: Representation

▶ Review Granted: Factual Error

- *Army, Fort Lee*, 63 FLRA 145, 148 (2009)
 - RD: firefighter spends 25% day on supervisory duties, BUT testimony – *additional* 25%
 - RD also relied on testimony that firefighter spent 50% day supervisory duties but ignored testimony that rest of day in support of those duties
 - Authority: RD committed clear and prejudicial factual errors; review granted
 - On review, Authority reversed RD and excluded employee as a supervisor

Questions?

